

82-939

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No.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

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**ROBERTO REQUENA,**

*Petitioner,*

vs.

**PEOPLE OF THE STATE OF ILLINOIS,**

*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO  
THE APPELLATE COURT OF ILLINOIS,  
FIRST JUDICIAL DISTRICT**

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### QUESTIONS PRESENTED

Whether Petitioner's Fourteenth Amendment due process and equal protection rights were violated when a criminal trial court applied the Illinois Rape Shield Statute, Section 115-7(a) of the Criminal Code (Ill.Rev.Stat. 1981, ch. 38, par. 115-7(a)) to restrict effective cross-examination of a crucial witness.

### LIST OF PARTIES TO PROCEEDINGS

The parties to the proceedings below include Petitioner, the People of the State of Illinois and co-Defendants Joseph and Michael Martinez.

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NO.  
IN THE  
SUPREME COURT OF THE UNITED STATES  
December Term, A.D. 1982

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ROBERTO REQUENA,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

---

PETITION FOR A WRIT OF CERTIORARI  
TO THE APPELLATE COURT OF ILLINOIS,  
FIRST DISTRICT

Petitioner, Roberto Requena,  
respectfully prays that a Writ of  
Certiorari issue to review the judgment  
and opinion of the Appellate Court of  
Illinois, First District.

OPINIONS BELOW

The judgment of the Circuit Court of Cook County is not reported. The Opinion of the Appellate Court is reported at 105 Ill.App.3d 831, 61 Ill.Dec. 636, 435 N.E.2d 125 (1982). The Opinion of the Appellate Court is

included as Appendix "A" to this Petition. The Order of the Supreme Court of Illinois denying the Petition for Leave to Appeal without opinion is not officially reported. The letter from the Supreme Court of Illinois denying the Petition for Leave to Appeal is included as Appendix "B" to this Petition.

#### JURISDICTION

The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal on October 5, 1982. The Judgment of the Appellate Court of Illinois, First District was entered on March 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). 28 U.S.C. Section 2403(b) may be applicable to this Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the  
Constitution of the United States:

" . . . Nor shall any State  
deprive any person of life,  
liberty, or property,  
without due process of law;  
nor deny to any person  
within its jurisdiction  
the equal protection of  
the laws."

Sixth Amendment to the Constitution  
of the United States:

" In all criminal  
prosecutions, the accused  
shall enjoy the right . . .  
to be confronted with the  
witnesses against him . . ."

STATEMENT OF THE CASE

On August 6, 1978, Petitioner  
Roberto Requena was arrested along with  
Michael and Joseph Martinez on the  
charges of aggravated kidnapping,  
deviate sexual assault, and rape. Prior  
to these charges, Petitioner Requena,

an honors graduate of a State University, had never been arrested.

At trial, the State's evidence showed that after drinking in a bar from 10:00 p.m. to 3:30 a.m., the Complainant and a person admittedly her boyfriend drove to a secluded beach behind a local utility plant. The Complainant and her boyfriend remained parked from approximately 4:00 a.m. to 5:15 a.m.

The State introduced evidence of the presence of human spermatozoa in the Complainant's vagina. Spermatozoa can remain in a woman's vagina for up to fourteen (14) hours after its deposit.

The trial court then applied the Illinois Rape Shield Statute to restrict defense cross-examination of the Complainant as to her sexual activity

during that fourteen (14) hour period. The defense was not permitted to cross-examine the Complainant as to her presence in the middle of the night at a secluded beach with a man admittedly her boyfriend. Neither was the defense permitted to cross-examine the prosecutrix as to whether an Intra Uterine Device (IUD) was in place in her uterus and vagina in the fourteen (14) hour period prior to the taking of the slides which showed spermatozoa present in her vagina.

The application of the Rape Shield Statute by the court to restrict that line of questioning is particularly significant in light of the fact that the Petitioner was rendered temporarily impotent at some time during the fourteen (14) hour period in which the spermatozoa was viable. The Petitioner



testified that on August 6, 1978, he asked the Complainant to have sexual intercourse with him. Despite the consent of the Complainant, the nervousness of the Petitioner resulted in his inability to maintain an erection of his penis with which he could vaginally penetrate the Complainant.

On Appeal to the Appellate Court of Illinois, Petitioner argued that the application of Ill.Rev.Stat. Ch. 38, par. 115-117(a) (hereinafter Rape Shield Statute) by the trial court was in error in that (a) the statute is unconstitutional on due process and equal protection grounds, and (b) the statute was applied unconstitutionally in this case to exclude relevant evidence that is beyond the scope of the statute.



In affirming Petitioner's conviction the Appellate Court said:

The trial court excluded this evidence under section 115-7(a) of the Criminal Code (Ill.Rev.Stat. 1979, ch. 38, par. 115-7(a)) which provides:

"In prosecutions for rape or deviate sexual assault, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused."

This statute was challenged on due process grounds in *People v. Cornes* (1980), 80 Ill.App.3d 166, 35 Ill.Dec. 818, 399 N.E.2d 1346. In *Cornes*, the court noted that the statute neither precluded cross-examination of a complainant nor prevented the defendant from attacking complainant's credibility and veracity. The statute merely denied a defendant the opportunity to harass and humiliate the complainant. Therefore, the court found the statutory evidentiary

restrictions did not violate defendant's due process rights. On the basis of Cornes, we find defendant's due process argument to be without merit.

No Illinois court has addressed the issue of whether the statute violates equal protection rights. However, in *Cherry v. State* (1981) Ind.Sup.Ct., 414 N.E.2d 301 and *Finney v. State* (1979), Ind.App.Ct., 385 N.E.2d 477, the statute survived an equal protection challenge. The courts reasoned that because a defendant in a rape case is not within a suspect classification, the equal protection clause requires only that the statute be rationally related to a legitimate state purpose. The courts then found that the statute was a rational attempt by the legislature to protect the complainant from harassment and humiliation and encourage victims of sexual assaults to report the crimes without fear of having their past sexual activities brought before the public. We agree with the rationale in *Cherry* and *Finney* and find that section 115-7 of the

Illinois Criminal Code does not violate defendant's equal protection rights. (Emphasis added)

People v. Reguena,  
(First District 1982), 105  
Ill.App.3d 831, 61 Ill.Dec.  
636, 435 N.E.2d 125, 128.

(Appendix "A", pp. 5-7)

The federal question sought to be reviewed was raised in the Appellate Court of Illinois in Petitioner's brief by his argument that "the enforcement by the trial court of the Rape Shield Statute was error in that the statute is unconstitutional on equal protection and due process grounds and the statute was applied in this case to exclude relevant evidence which is beyond the scope of the statute."

In his Petition for Leave to Appeal to the Illinois Supreme Court Petitioner relied on the constitutional protections

afforded Defendants in Davis v. Alaska, 415 U.S. 308 (1974). The Appellate Court of Illinois, in its decision relied on People v. Cornes, (5th District, 1980) 30 Ill.App.3d 166, 35 Ill.Dec. 818; Cherry v. State, (1981) Ind.Sup.Ct., 414 N.E.2d 301; and Finney v. State, (1979), Ind.App.Ct., 385 N.E.2d 477, to hold that Petitioner's due process and equal protection argument is without merit.

A Petition for Leave to Appeal to the Illinois Supreme Court was denied on October 5, 1982.

REASONS FOR GRANTING THE WRIT

PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS WERE VIOLATED WHEN THE TRIAL COURT APPLIED THE RAPE SHIELD STATUTE TO RESTRICT CROSS-EXAMINATION OF A CRUCIAL STATE WITNESS.

This case presents an issue which mirrors the issue addressed by this Court in Davis v. Alaska, 415 U.S. 308 (1974). Petitioner contends that his Sixth Amendment right to effective cross-examination (Davis), incorporated by and applicable to the states by the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400 (1965), Smith v. Illinois, 390 U.S. 129 (1968), was violated when the trial court applied Ill.Rev.Stat. (1981), ch. 38, paragraphs 115-17(a) to restrict cross-examination of the Complainant.

In Davis, the trial court applied a juvenile statute to prevent any

reference by the defense in the course of cross-examination to the fact that a crucial state witness was on probation at the time he originally identified the defendant and was biased or had a motive to testify. The goal of the defense's line of questioning was to show hasty or faulty identification to shift suspicion away from himself or that the witness might have been subject to police pressure and fear of probation revocation. The goal of the defense question was not to harass or embarrass the State's witness.

In the instant case, the defense counsel sought to show not the bad character of the Complainant but her sexual activity within a specified pertinent period of time. Semen can remain in a vagina for fourteen (14) hours. Moenssens, Andre A.; Moses,



Ray and Inbau, Fred, SCIENTIFIC EVIDENCE IN CRIMINAL CASES, Foundation Press, Mineola, New York (1973), p. 264. Questions covering that period of time are necessary to establish or limit the significance of the presence of semen. Defense counsel was permitted only one question of the prosecution as to whether the Complainant had sexual intercourse with her boyfriend in the car. That one question was inadequate to establish the sexual activity of the Complainant in that fourteen (14) hour period before the presence of spermatozoa was discovered. That sole question was insufficient to permit defense counsel to construct a record from which to argue why the fourteen (14) hour period prior to the test was important. From the viewpoint of the jury, counsel might merely have been



embarking on a fishing expedition. The jury may have believed that defense counsel sought to harass, humiliate and embarrass the Complainant in direct contravention of the statutory intent.

Davis provides a two part test to establish whether Petitioner was denied his right under the Confrontation Clause to adequately cross-examine Complainant. First, whether Petitioner was precluded from engaging in effective cross-examination. Second, whether the permitted cross-examination was sufficient to elicit the information relevant to support the defendant's case.

Three factors must be considered: (1) whether the excluded questions were constitutionally protected; (2) whether the excluded questions were probative to the issue of the presence of sperm;

and (3) the importance of the witness' direct testimony. The goal of the inquiry was to elicit testimony regarding the sexual activity in a limited time period, not of bad character. Thus the line of questioning is within the defendant's right of cross examination and in contravention to the State's interest of limiting evidence of the character or reputation of a rape complainant. To rebut direct evidence and to bring out and weaken impact facts related to facts elicited on direct examination is also within a constitutionally protected right to confrontation of witnesses. The questions excluded were probative on the issue that during the fourteen (14) hour period of the viability of sperm, the activity of complainant was such as to provide opportunity and means

to be accessible for sexual contact with other than the Petitioner. The importance of the witness' testimony is critical where it is needed on the State's part to convict and reciprocally to provide the link of proof needed to cast a reasonable doubt on the alleged guilt of the defendant.

Notwithstanding these reasons, the existence of a constitutional violation cannot be predicated on an evaluation of the abstract probativeness of a particular type of evidence, but upon whether the defendant was prevented from presenting evidence which would have been effective in his case.

Upon a factual determination that an effective cross-examination did not occur, the balance of interests shows that no countervailing State interest is paramount to the Petitioner's right

of effective cross-examination in the instant case. In Davis, the trial court treated the statute protecting the witness' relevant juvenile record in order to preserve the anonymity of juvenile offender, essentially as a privilege. Petitioner contends that the trial court's application of the Rape Shield Statute to exclude Complainant's relevant testimony in order to prevent harassment of the Complainant is tantamount to a privilege.

Testimonial privileges are granted in various situations. The denial of or significant diminution of the right to confront and cross-examine a witness calls into question the ultimate integrity of the fact finding process and requires the competing interest (i.e., the privilege) to be closely

examined. Rather than merely determining whether the statutory prohibition of the Rape Shield Statute is rationally related to the State's interest, the Petitioner urges the Court to make an independent evaluation like the one in Davis to assess the State's need for the prohibition as applied to the facts in the case at bar. To test whether there is a rational relationship between the interest of the State and the statutory prohibition is only a superficial examination. Petitioner strongly refutes that the line of questioning which defense sought to pursue would humiliate or harass the Complainant. Disclosure of the Complainant's sexual activities in the limited time frame would result in only temporary embarrassment to her.

Petitioner does not challenge the legitimacy or wisdom of the State interest. Petitioner contends that there is simply a constitutionally insufficient nexus in this case between the assertion of the privilege and the protection of the State's interest. A constitutional right is violated when a privilege is asserted to deny effective cross-examination notwithstanding the strength of the nexus between the privilege and the State's interest underlying that privilege.

In Davis, the Court said: "The State cannot, consistent with the right of confrontation, require the Petitioner to bear the full burden of vindicating the State's interest..." 415 U.S. at 320.



Thus, the burden of any privilege falls with equal weight on the defendant, and the likelihood of injury to the defendant does not vary with the importance of the privilege or degree to which it fosters the relevant State policy. The assertion of any privilege violates the defendant's right to confront where it deprives him of an effective right to cross-examination. Petitioner contends the conflict in Requena could have been properly avoided through a prosecutorial choice between the State's two interests -- the assertion of a privilege through application of the Rape Shield Statute or the interest in the prosecution of the defendant. It was fundamentally unfair for the State to attempt to satisfy these two interests simultaneously at the expense of the



Petitioner's right to cross-examine and the trial court should have required the State to choose which interest to protect. The State had the option of protecting the interest underlying the privilege by refraining from using the Complainant to make out its case. A privilege must yield where its assertion by a witness would foreclose the defendant from continuing a constitutionally protected line of inquiry. Davis v. Alaska, 415 U.S. 308 (1974).

Further, there is no less restrictive alternative available that would have allowed the defense to cross-examine without forcing the State to forego the benefits from the assertion of the privilege. For instance, since the facts in Requena did not involve the assertion of a Fifth

Amendment privilege, a grant of use of immunity would not have enabled the State to compel the Complainant to testify without subsequent prosecution. Not all privileges are amenable to a less restrictive alternative to achieve equivalent results. The Complainant in a rape case is the critical witness and will always testify. The importance of the State's interest, to prosecute, and the degree to which the privilege, the statutory effect, serves the interest and the importance of the witness to the prosecution's case, indispensability, may properly be taken into account in making this determination. All that the confrontation clause of the Sixth Amendment requires is that the privilege not be asserted at the expense of the right to effective cross-examination.

Assuming arguendo, that the Petitioner's case is a difficult one in which there is a strong nexus between the assertion of the privilege and the protection of the State interest and in which there is available no less restrictive alternative, to deny cross-examination on a fourteen (14) hour period of time introduced by the State in its evidence of live spermatozoa present in the vagina of the Complainant is to foreclose the Defendant from making a meaningful record of the sexual activity of the Complainant in the operative time frame of the prosecution per se. The prosecution must prove guilt beyond a reasonable doubt. To restrict the defense's making of a record that will demonstrate to the trier a reasonable doubt as to the guilt of the defendant

is to deny the constitutionally protected right to effective cross-examination. Only when the defendant is permitted to bring out all possible probative evidence on cross-examination that rebuts or qualifies the testimony of the prosecution witnesses will a criminal trial be in constitutional compliance.

The constitutional challenge of a statute as applied must be determined on a case by case basis. While the Illinois Courts have in other cases held that the Rape Shield Statute was constitutionally applied, these cases have no bearing on the facts to which the statute was applied in Petitioner's case. In People v. Buford, \_\_\_\_\_ Ill.App.3d \_\_\_\_\_, \_\_\_\_\_ N.E.2d \_\_\_\_\_, (First Dist. Oct. 26, 1982), the defendant challenged the

constitutionality of the statute as applied. The Court held that the statute in its application to the defendant was constitutional. In that case defendant sought to admit prior conviction of Complainant for prostitution to show bias. It is distinguishable from the facts in Requena because the Illinois Rape Shield Statute does not preclude cross-examination of the prior sexual activity of the Complainant with the accused and defendant brought out the extensiveness of their previous relationship of prostitute and client.

Petitioner Requena sought not to question Complainant about her sexual character but only her sexual activities in the fourteen (14) hours prior to the discovery of the presence of spermatozoa in her vagina. In that

manner the intent of the statute, to prevent harassment, would not have been violated and an effective constitutionally protected cross-examination would have resulted.

PETITIONER'S EQUAL PROTECTION RIGHTS  
WERE VIOLATED WHEN THE TRIAL COURT  
APPLIED THE RAPE SHIELD STATUTE TO  
RESTRICT DEFENSE'S CROSS-EXAMINATION  
OF THE COMPLAINANT.

The right to confront witness is fundamental to our constitutional system of due process of law. There is no doubt that the right of cross-examination is included in the right of the accused in a criminal case to confront the witness against him. Pointer v. Texas, 380 U.S. 400 (1965).

Petitioner contends that the trial court's application of the Rape Shield Statute deprived him of the fundamental



right to confront and cross examine the Complainant. Since the application of the Statute has deprived the Petitioner of this fundamental right, the statute must promote an overriding or compelling interest of the government in order to be valid.

To insure that the witness does not feel embarrassed by the intimate substance of the testimony the Rape Shield Statute classifies the Petitioner and others similarly situated for a different burden than other defendants in criminal cases. For example, a person charged with murder is allowed to present evidence regarding the deceased's character whenever he has put the deceased's character in issue, as is the effect of raising the issue of self defense. People v. Moore, 27 Ill.App.3d 337, 326 N.E.2d 422 (First



Dist. 1976); People v. Baer, 35 Ill.App.3d 391, 342 N.E.2d 177 (First Dist. 1976). The testimonial privilege which the statute creates to encourage rape victims to testify should be strictly scrutinized by the Court to ascertain whether it has a sufficient relationship to the interest of the State in prosecuting the defendant. The Rape Shield Statute denies the Petitioner as classified the equal protection of law guaranteed by the equal protection clause.

The equal protection clause mandates that rape defendants will be dealt with in a similar manner by the State. It does not reject the State's ability to classify persons in the creation and application of laws, but it does guarantee that those classifications will not be based upon

impermissible criteria or arbitrarily used to burden a group of individuals.

The Rape Shield Statute is an over-inclusive classification as applied because it restricts cross-examination rights of all rape defendants on the subject of the Complainant's prior sexual history, plus it restricts cross-examination by defendants who wish to cross examine complainants as to their prior sexual activity within a limited and relevant period of time. For example in the case at bar, the Petitioner was restricted as to his cross-examination of the Complainant's prior sexual history within the fourteen (14) hours prior to the discovery of evidence of spermatozoa in her vagina. The State on its direct examination of the Complainant had introduced against the Petitioner evidence of

spermatozoa in the vagina to prove penetration, a necessary element of its case. The classification of the Petitioner and those similarly situated cannot survive the Court's strict scrutiny as to its purported purpose. How can the application of the Rape Shield Statute further the State's interest in prosecution when relevant evidence is excluded that lessens the burden which the State is legally bound to uphold. Thus, there is no correlation between the statute as applied to the Petitioner as representative of his class and the prosecution burden to prove rape defendants guilty beyond a reasonable doubt.

If the Court does not believe that strict scrutiny is required to review the Rape Shield Statute as applied,

Petitioner contends that whenever legislation limits the exercise of a fundamental right by a class of persons the State is required to show a factually demonstrable rational relationship to a legitimate State end. As one commentator has noted:

"A classification is "neutral" whenever it treats persons in a dissimilar manner on the basis of some inherent human characteristic or status (other than racial heritage), or limits the exercise of a fundamental right by a class of persons. Whenever legislation involves a neutral classification, the Court will validate it only if it has a factually demonstrable rational relationship to a legitimate state end. Applying this demonstrable basis standard of review, the Court should validate a statute only if the means used bear a factually demonstrable relationship to a state interest capable of withstanding analysis. The Court will scrutinize

the factual support for the legislation to determine whether its ends are capable of withstanding analysis and whether its means are rationally related to that end." Nowak, 62 Geo.L.J. at 1093-4.

This standard of review is distinguishable from the conceivable basis standard. Under the conceivable basis standard, whenever legislation treats classes in a dissimilar manner but does not employ a prohibited or neutral classification as the basis of dissimilar treatment, the Court will uphold the legislation so long as there is any conceivable basis upon which the classification could bear a rational relationship to the state end. The Court will not review independently the factual basis of the end of the legislation or of the means employed.

In applying the factually demonstrable rational relationship, the Court can readily ascertain that the Rape Shield Statute has no factually demonstrable basis to the state interest. The Court's function as interpreter of our Constitution commands an independent review of the application of the statute to see what rights are accorded specific constitutional protection and to insure that these rights or classes are not subject to arbitrary limitation.

Petitioner incorporates, in support of his assertion that the statute as applied creates an arbitrary classification and an impermissible burden on his constitutional rights, the argument made in his Petition for Leave to Appeal to the Illinois Supreme Court (pages 19-21).



CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, entered herein.

Respectfully Submitted,

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December 3, 1982

APPENDIX "A"

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FIRST DIVISION  
March 8, 1982

Nos. 80-654 and 80-2204  
(CONSOLIDATED)

PEOPLE OF THE STATE	)	APPEAL FROM THE
OF ILLINOIS	)	CIRCUIT COURT
	)	OF COOK COUNTY.
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	
ROBERTO REQUENA,	)	HONORABLE
JOSEPH MARTINEZ and	)	RICHARD J. PETRARCA,
MICHAEL MARTINEZ,	)	PRESIDING.
	)	
Defendants-Appellants.)	)	

Mr. JUSTICE McGLOON delivered the opinion of the court:

Defendants Roberto Requena, Joseph Martinez and Michael Martinez were

charged by information with rape, deviate sexual assault, and aggravated kidnapping. After a jury trial, Requena was found guilty of rape and sentenced to a ten year term. Joseph Martinez and Michael Martinez were found guilty of all charges and sentenced to 15 years for aggravated kidnapping, 20 years for rape, and 20 years for deviate sexual assault. Requena filed a separate appeal which was consolidated by this court with the appeal of Joseph and Michael Martinez.

On appeal, Requena contends (1) the trial court improperly excluded relevant defense evidence; (2) hearsay evidence was improperly admitted; (3) he was not proved guilty beyond a reasonable doubt; and (4) the jury should have been instructed on attempt rape. Joseph and Michael Martinez

contend the State's closing argument was prejudicial. All defendants contend their sentences are excessive.

We affirm.

Complainant testified that at approximately 4:15 a.m. on August 6, 1978 she and her boyfriend James Scott drove to a beach near a Commonwealth Edison plant. While there, a man whom complainant identified as Michael Martinez approached the driver's side of the car and asked for a cigarette. As Scott complied with the request, he was sprayed in the face with mace. Joseph Martinez then reached through the passenger window and sprayed mace on complainant. The two assailants dragged complainant from the car, beat her, and forced her into a green Gremlin driven by defendant Requena. They drove for approximately ten minutes and

stopped near some gravel hills. All three men forced complainant to engage in intercourse and perform fellatio. Complainant was pushed out of the car and as defendants drove away, she noted the license number PW 3090.

After complainant dressed, she ran to the street and stopped a car. The driver helped her find a police officer. She gave the police the license number of the car and told him she had been raped by three men. The officer told her James Scott had already reported the incident. The officer returned to the scene of the alleged offense.

James Scott testified that after he was sprayed with a mace-like substance, he was unable to see, but heard complainant screaming. When he regained his sight, complainant was

being forced into a car approximately 15 feet away. He attempted to follow the car, but drove off the road. Shortly thereafter, he returned to the beach with a friend. They found two policemen and drove around the beach. Fifteen minutes later, they found complainant with two police officers. Complainant was hysterical and badly bruised.

Officer Raymond Uchman testified that while he was on duty in a squad car on the morning in question, he was approached by Scott and another man. Scott's eyes were watering and he appeared tense. He and his partner took Scott to an area near the Commonwealth Edison plant and approximately 30 minutes later, they found complainant in a squad car with Lieutenant McNamara. Complainant was



crying hysterically and her face was swollen.

Lieutenant McNamara testified that complainant approached his car at approximately 6 a.m. and stated she had been raped. McNamara noticed blood stains on her clothing. She did not appear to be intoxicated or under the influence of drugs. Complainant further told McNamara the license number of the car in which her assailants fled was BW 3090. McNamara learned the plates were registered to Martinez who lived at 10244 South Yates.

Officer James Gonsales monitored a police radio report at 6 a.m. and proceeded to 10244 Yates to look for a green Hornet. He saw the vehicle traveling on Yates and chased it five blocks before the car stopped. Requena and Michael Martinez were seated in

front. Joseph Martinez was seated in back. A can of mace was found behind the back seat.

The parties stipulated to the following facts. A shirt worn by Michael Martinez and jeans worn by Joseph Martinez at the time of their arrest were stained with blood of the same type as that of complainant. Cloth found in defendant's car was also stained with this same blood type. A physical examination of complainant revealed she sustained a black eye and contusions and abrasions of the neck, face, head, back, left wrist, right wrist and thigh. She also had a small vaginal laceration.

Defendant Michael Martinez testified that he, his brother Joseph, and Roberto Requena went to the beach to purchase marijuana. When he got

out of his car, he heard a woman scream. He removed a can of mace from the glove compartment and approached the car from which the screams came. He saw Scott beating complainant. Complainant screamed for help and said Scott had taken drugs and was crazy. Michael Martinez sprayed Scott with mace, took complainant to his car and left the beach.

Later, they parked the car and complainant, while alone with Michael in the car, offered to engage in intercourse with Michael to thank him for saving her life. Later, she also had intercourse with Joseph Martinez and Roberto Requena. When defendants offered to take complainant home, she became irate. Rather, complainant wanted to return to the beach to find Scott, but defendants refused to take

her. On cross-examination, he admitted that during an interview with an assistant State's Attorney, he claimed he had never seen complainant or James Scott.

Joseph Martinez testified that when Michael returned to the car with complainant, complainant was sobbing and bloodied. She said her boyfriend had beaten her. Joseph also had intercourse and oral sex with complainant, but did not force her to participate.

Roberto Requena's testimony corroborated that of the Martinez'. However, he testified that although he attempted, he was unable to have intercourse with complainant. Complainant agreed to have intercourse with Requena. On cross-examination, it was revealed that during an interview

with the assistant State's Attorney, Requena denied knowledge of the incident.

First, Requena contends that the trial court excluded relevant defense evidence where it precluded cross-examination of complainant regarding her use of an intrauterine device and her sexual activities, if any, with James Scott prior to the incident. The trial court excluded this evidence under section 115-7(a) of the Criminal Code (Ill. Rev. Stat. 1979, ch. 38, par. 115-7(a)) which provides:

"In prosecutions for rape or deviate sexual assault, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the

past sexual conduct of the  
alleged victim with the  
accused."

Defendant contends the application of  
the statute deprived him of his due  
process and equal protection rights.

This statute was challenged on  
due process grounds in People v.  
Cornes (1980), 80 Ill.App.3d 166,  
399 N.E.2d 1346. In Cornes, the court  
noted that the statute neither precluded  
cross-examination of a complainant nor  
prevented the defendant from attacking  
complainant's credibility and veracity.  
The statute merely denied a defendant  
the opportunity to harass and humiliate  
the complainant. Therefore, the court  
found the statutory evidentiary  
restrictions did not violate defendant's  
due process rights. On the basis of



Cornes, we find defendant's due process argument to be without merit.

No Illinois court has addressed the issue of whether the statute violates equal protection rights. However, in Cherry v. State (1981) Ind. Sup. Ct., 414 N.E.2d 301 and Finney v. State (1979), Ind. App. Ct., 385 N.E.2d 477, the statute survived an equal protection challenge. The courts reasoned that because a defendant in a rape case is not within a suspect classification, the equal protection clause requires only that the statute be rationally related to a legitimate state purpose. The courts then found that the statute was a rational attempt by the legislature to protect the complainant from harassment and humiliation and encourage victims of sexual assaults to report the crimes

without fear of having their past sexual activities brought before the public. We agree with the rationale in Cherry and Finney and find that section 115-7 of the Illinois Criminal Code does not violate defendant's equal protection rights.

We add that the rape shield statute was not the only basis for excluding the evidence of complainant's sexual activities, if any, with Scott. Even prior to the enactment of the statute, evidence of complainant's prior specific sexual acts was inadmissible and defendant was limited to proving only complainant's general reputation for immorality and unchastity. (People v. Collins (1962), 25 Ill.2d 605, 186 N.E.2d 30, cert. den. 373 U.S. 942, 10 L.Ed.2d 697, 83 S.Ct. 1551; People v. Burgin (1979), 74 Ill.App.3d

58, 392 N.E.2d 251.) Thus, defendant in this case could not have questioned complainant regarding sexual activity she may have had with Scott prior to the incident.

Requena further contends hearsay evidence corroborating complainant's testimony was improperly admitted. He first objects to Lieutenant McNamara's testimony that complainant told him she had been raped. However, this evidence was admissible under the "prompt complaint" of rape exception to the hearsay rule. (People v. Damen (1963), 28 Ill.2d 464, 193 N.E.2d 25; People v. Hernandez (1980), 88 Ill.App.3d 698, 412 N.E.2d 572.) Requena further objects to the admission of complainant's testimony that the police officer told her Scott had already reported the abduction and to

the admission of Lieutenant McNamara's testimony specifying the license number which complainant reported to him. The admission of this evidence was not objected to at trial nor was it raised in the post-trial motion. Thus, the issue was not preserved for review. (People v. Osborn) (1977), 53 Ill.App.3d 312, 368 N.E.2d 608, cert. den. 439 U.S. 837, 58 L.Ed.2d 134, 99 S.Ct. 122; People v. Witherspoon (1975), 33 Ill.App.3d 12, 337 N.E.2d 454.) Furthermore, the overwhelming evidence of guilt would render the error, if any, in admitting the evidence harmless. People v. Hall (1980), 90 Ill.App.3d 1073, 414 N.E.2d 201.

Third, Requena contends he was not proved guilty of rape beyond a reasonable doubt. However, the record overwhelmingly refutes this contention.

Complainant's testimony alone, if believed by the jury, would have been sufficient evidence of guilt, even though contradicted by the accused. (People v. Lewis (1979), 73 Ill.App.3d 951, 392 N.E.2d 707.) Corroborating evidence of guilt was established by complainant's prompt report of the incident (People v. Damen (1963), 28 Ill.2d 464, 193 N.E.2d 25; People v. Edmond (1979), 76 Ill.App.3d 540, 395 N.E.2d 106), her hysterical condition after the occurrence (People v. Griggs (1970), 131 Ill.App.2d 257, 266 N.E.2d 398), and defendant's flight from police (People v. Ward (1980), 83 Ill.App.3d 766, 404 N.E.2d 847). It is the function of the jury to weigh the evidence and assess the credibility of the witnesses. (People v. Burgin (1979), 74 Ill.App.3d 58, 392 N.E.2d

251.) In view of the evidence in this case, cannot encroach upon this function.

Fourth, Requena contends the trial court erred in failing to instruct the jury on attempt rape. Defendant admits he did not tender an attempt rape instruction, but maintains the instruction should have been give sua sponte.

A court must exercise restraint in giving instructions on its own motion. (People v. Spataro (1978), 67 Ill.App.3d 69, 384 N.E.2d 553.) In doing so, it risks interfering with the defense strategy and thus committing error. (67 Ill.App.3d 75, 384 N.E.2d 557, citing People v. Precup (1978), 73 Ill.2d 7, 17, 382 N.E.2d 227, 231.) In the case at bar, defendant testified he was unable to have intercourse with



complainant. It is therefore reasonable to assume that defense counsel intended to present the jury with only two alternatives, namely guilty of rape or not guilty, and eliminate the possibility of a guilty verdict on attempt rape. Under these circumstances the trial court was not obligated to instruct the jury on attempt rape.

Joseph and Michael Martinez contend the prosecutor's improper remarks during closing argument denied them a fair trial. They first complain of the prosecutor's statements that defendants had lied. However, in light of complainant's testimony, this comment was warranted. (People v. Witherspoon (1975), 33 Ill.App.3d 12, 337 N.E.2d 454.) Defendants also object to the prosecutor's characterization of them as "animals" and to the comment that

complainant, in reporting the incident, "did something that if more women would do \*\*\* there would be a lot more defendants caught." However, defendants' objections to the comments were promptly sustained and the evidence of guilt was clear and convincing. Thus, we cannot say that the remarks influenced the verdict or denied defendants of a fair trial. People v. Redmond (1979), 73 Ill.App.3d 160, 390 N.E.2d 1364.

Finally, all defendants contend their sentences are excessive. They maintain the trial court ignored mitigating factors that they were in their 20's when the crime was committed, they had no prior convictions, the social environment to which they would return was conducive to rehabilitation, and their backgrounds indicated they

were unlikely to commit criminal acts in the future. Defendants therefore contend the trial court abused its discretion in sentencing.

The trial court is generally in a better position to determine sentences than is this court and considerable caution should be exercised in disturbing a sentence on appeal. (People v. Perruquet (1977), 68 Ill.2d 149, 368 N.E.2d 882; People v. Burdine (1980), 82 Ill.App.3d 984, 412 N.E.2d 554.) In determining a sentence, the trial court is authorized to consider not only defendant's character, but also the nature and circumstances of the offense. (People v. Lykins (1979), 77 Ill.2d 35, 394 N.E.2d 1182, cert. den. 445 U.S. 952, 63 L.Ed.2d 787, 100 S.Ct. 1602; People v. Cook (1976), 41 Ill.App.3d 946, 354 N.E.2d

122.) Other factors to be considered are defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. People v. Cozzi (1981), 93 Ill.App.3d 94, 416 N.E.2d 1192; People v. Walls (1980), 87 Ill.App.3d 256, 408 N.E.2d 1056.

Clearly, the brutal nature of the crimes is a compelling fact in aggravation of the sentences. Complainant was sprayed with mace, forcibly abducted, and beaten by Michael and Joseph Martinez. They forced her to engage in intercourse and deviate sexual acts. Apparently the Martinezes initiated the ordeal. In light of these factors and the seriousness of the offenses, we cannot say the trial court abused its discretion in sentencing each Martinez to 20 years for rape and

deviate sexual assault and 15 years for aggravated Kidnapping. Requena received a 10 year sentence for rape. The disparity between his sentence and those imposed upon the Martinezes is itself an indication that the trial court considered the factors in mitigation. Therefore, we find the trial court did not abuse its discretion.

For the foregoing reasons, the judgments of the circuit court of Cook County are affirmed.

JUDGMENTS AFFIRMED.

CAMPBELL, P.J. and O'CONNOR, J.,  
Concur.

APPENDIX "B"

ILLINOIS SUPREME COURT  
JULEANN HORNYAK, CLERK  
SUPREME COURT BUILDING  
SPRINGFIELD, ILLINOIS 62706  
(217) 782-2035

October 5, 1982

Mr. Garland W. Watt  
Attorney at Law  
400 S. Dearborn St., S#500  
Chicago, IL 60605

No. 56842 - People State of Illinois,  
respondent, vs. Roberto  
Requena, et al. (Roberto  
Requena, petitioner).  
Leave to Appeal, Appellate  
Court, First District.

The Supreme Court today DENIED the  
petition for leave to appeal in the  
above entitled cause.

Very truly yours,

JULEANN HORNYAK  
Clerk of the Supreme  
Court



FEB 5 1983

ALEXANDER I. STEVAS,  
CLERK

No. 82-939

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

**ROBERTO REQUENA,**

*Petitioner,*

VS.

**PEOPLE OF THE STATE OF ILLINOIS,**

*Respondent.*

On Petition For Writ Of Certiorari To The Appellate  
Court Of Illinois, First Judicial District

**RESPONDENT'S BRIEF IN OPPOSITION**

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**QUESTION PRESENTED FOR REVIEW**

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Whether due process was violated when the trial court applied the Illinois Rape Shield statute to exclude questions concerning the rape victim's prior sexual conduct.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

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**ROBERTO REQUENA,**

*Petitioner,*

vs.

**PEOPLE OF THE STATE OF ILLINOIS,**

*Respondent.*

---

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On Petition For Writ Of Certiorari To The Appellate  
Court Of Illinois, First Judicial District

---

**RESPONDENT'S BRIEF IN OPPOSITION**

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**OPINION BELOW**

---

Petitioner's state court conviction for rape was affirmed by the Appellate Court of Illinois, First District. *People v. Requena*, 105 Ill. App. 3d 831, 435 N.E.2d 125 (1st Dist. 1982). A petition for leave to appeal to the Illinois Supreme Court was denied on October 5, 1982. Copies of both the Appellate Court's opinion and the Illinois Supreme Court's order are attached to the petitioner's brief as appendices.



## **JURISDICTION**

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Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3). However, as treated more fully below, respondent submits that no good reason exists for this Court to exercise its sound judicial discretion and grant the petition for a writ of certiorari.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

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U.S. CONST., Amend. VI provides that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST., Amend. XIV provides, in pertinent part, that:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTE INVOLVED

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*Ill. Rev. Stat.*, ch. 38, § 115-7(a) (1978) provides that:

In prosecutions for rape or deviate sexual assault, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused.

## STATEMENT OF FACTS

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The facts relevant to the issue raised by petitioner are adequately set forth in the opinion of the Illinois Appellate Court. *People v. Requena*, 105 Ill. App. 3d 831, 435 N.E.2d 125 (1st Dist. 1982).

## REASON FOR DENYING THE WRIT

---

**APPLICATION OF THE ILLINOIS RAPE SHIELD STATUTE IN THIS CASE WAS NOT VIOLATIVE OF DUE PROCESS SINCE ONLY IRRELEVANT, IMMATERIAL QUESTIONS DESIGNED TO HUMILIATE AND EMBARRASS THE RAPE VICTIM WERE EXCLUDED AT TRIAL.**

Petitioner seeks this writ of certiorari contending that the Illinois Rape Shield statute deprived him of due process since it precluded cross-examination of the complainant regarding her use of an intrauterine device and her sexual activities, if any, with her boyfriend prior to the alleged rape.<sup>1</sup>

Review of this case is not warranted. The trial court properly applied the rape shield statute excluding only an irrelevant line of questioning designed to harass and humiliate the complainant and direct the attention of the jury to issues not relevant to the controversy. Petitioner was not prevented from introducing relevant evidence, or from challenging the complainant's credibility and veracity, or from otherwise utilizing cross-examination as an effective tool of impeachment.

Illinois Courts have considered and upheld the validity of the rape shield statute on numerous occasions. See *People v. Cornes*, 80 Ill. App. 3d 166, 399 N.E.2d 1346 (5th Dist. 1980); *People v. Bachman*, 92 Ill. App. 3d 419, 414 N.E.2d 1369 (3rd Dist. 1981); *People v. Siefke*, 91 Ill.

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<sup>1</sup> Ill. Rev. Stat., ch. 38, § 115-7(a) (1978), provides that:

In prosecutions for rape or deviate sexual assault, the prior sexual activity or the reputation of the alleged victim is inadmissible except as evidence concerning the past sexual conduct of the alleged victim with the accused.

App. 3d 14, 422 N.E.2d 1071 (2d Dist. 1981); *People v. Bufford*, 110 Ill. App. 3d 46 (1st Dist. 1980). In *Cornes*, the court stated:

Complainant's past sexual conduct has no bearing on whether she has consented to sexual relations with the defendant. The legislature recognized this fact and chose to exclude evidence of complainant's reputation for chastity as well as specific acts of sexual conduct with third persons in cases of rape and sexual deviate assault.

*People v. Cornes*, 80 Ill. App. 3d at 175.<sup>2</sup>

Petitioner cites to *Davis v. Alaska*, 415 U.S. 308 (1974), as controlling. His reliance on *Davis* is misplaced. The defendant in *Davis* was precluded under a state statute preserving the confidentiality of juvenile delinquency adjudications, from impeaching the credibility of a prosecution witness by cross-examination designed to establish possible bias. 415 U.S. at 314. In the

<sup>2</sup> Forty-five states have recognized this fact and have enacted various forms of rape shield laws. In the following cases state courts have upheld the constitutionality of their rape shield laws: *Kemp v. State*, 606 S.W.2d 573 (Ark. 1980); *People v. Wells*, 102 Mich. App. 558, 302 N.W.2d 232 (1980); *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1980); *State v. Howard*, 426 A.2d 457 (N.H. 1981); *State v. Fortney*, 301 N.C. 31, 269 S.E.2d 110 (1980); *State v. Higley*, 621 P.2d 1043 (Mont. 1980); *State v. Gardner*, 59 Ohio St.2d 14, 391 N.E.2d 337 (1979); *State v. McCoy*, 261 S.E.2d 159 (S.C. 1979); *State v. Hamilton*, 289 N.W.2d 470 (Minn. 1979); *State v. Blue*, 225 Kan. 576, 592 P.2d 897 (1979); *State v. Green*, 260 S.E.2d 251 (W.Va. 1979); *Roberts v. State*, 268 Ind. 127, 373 N.E.2d 1103 (Ct. App. 1978); *State v. Ryan*, 157 N.J. Super 121, 384 A.2d 570 (Super. Ct. App. Div. 1978); *State v. Herrera*, 92 N.M. 7, 582 P.2d 384 (Ct. App. 1978); *People v. Mandel*, 403 N.Y.S.2d 63 (App. Div. 1978); *Smith v. Commonwealth*, 566 S.W.2d 181 (Ky. App. 1978); *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978); *State v. Barrington*, 31 Or. App. 265, 570 P.2d 394 (1977); *People v. Blackburn*, 56 Cal. App. 3d 685, 128 Cal. Rptr. 864 (Ct. App. 1976).

instant case, petitioner was not precluded from using cross-examination to attack the credibility of the complainant or to expose a bias. Nothing of *relevance* was kept from the jury.

Petitioner was permitted to ask the victim whether she had engaged in sexual intercourse with her boyfriend on the night of the alleged rape. The complainant answered that she had not. Nevertheless, petitioner argues that *Davis* requires that he be permitted to question the complainant further as to any previous sexual intercourse with her boyfriend, since such questioning "was probative of the existence of semen in the complainant."<sup>3</sup> (Pet. at 16) Such an argument ignores the initial inquiry and denial of any previous sexual intercourse on the evening in question.

Moreover, the presence of semen was not relevant or material in view of the defense theory presented at trial. Both petitioner and his co-defendants testified that the victim willingly consented to sexual intercourse. Thus, whether intercourse had occurred and whether semen was present was never at issue. The defense theory logically accounted for any presence of semen in the complainant. Further probing questions into prior sexual acts of the complainant would have been nothing more

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<sup>3</sup> Petitioner argues that only when a defendant is permitted to bring out all possible probative evidence on cross-examination will a criminal trial be in constitutional compliance. Petitioner's argument ignores the procedural rules against the introduction of hearsay and opinion evidence, the rule that the scope of cross-examination may not exceed the limits of direct examination, and the threshold requirement for the admissibility of evidence—that its probative value outweigh any unfair prejudice. In each instance, evidence may be excluded even though it may tend to completely exonerate a defendant.

than a disguised attack on the character of the complainant having a substantial prejudicial effect—the likelihood that a jury exposed to such evidence would place the complainant on trial rather than determine the guilt or innocence of the accused.

Furthermore, evidence of the presence of semen, introduced by way of stipulation, was merely corroborative evidence of the commission of an act(s) of intercourse. It was not introduced, as petitioner claims, to prove the element of penetration. The positive, credible testimony of the victim was sufficient to convict the petitioner. *People v. Lewis*, 73 Ill. App. 3d 951, 392 N.E. 2d 701 (5th Dist. 1979). In fact, proof that the petitioner had sexual intercourse with the victim was not even necessary for a conviction of rape since petitioner was present at the commission of the rape, knew what was happening and did nothing to disassociate himself or to oppose it. *People v. Richardson*, 32 Ill.2d 412, 207 N.E. 2d 478, cert. denied, 384 U.S. 1201 (1965).

Even before the passage of the rape shield statute, Illinois courts had long recognized the irrelevancy of the questioning petitioner wished to pursue and had refused to permit a defendant to degrade and belittle a complainant in the eyes of the jury with probing questions into her prior consensual sexual activities. *People v. Bergin*, 74 Ill. App. 3d 58, 392 N.E.2d 1251 (1st Dist. 1979); *People v. Fink*, 59 Ill. App. 3d 51, 374 N.E.2d 1311 (2d Dist. 1974); *People v. Collins*, 25 Ill.2d 605, 186 N.E.2d 30 (1962), cert. denied, 373 U.S. 942 (1963).

The irrelevancy of petitioner's line of questioning has also been recognized by the federal courts and Congress with the passage of Rule 412 of the Federal Rules of Evidence. *Privacy of Rape Victims: Hearing on H.R. 14666 before the Subcomm. on Criminal Justice of the*



*Committee on the Judiciary*, 94th Cong., 2d Sess. at 14-15 (1976). In the leading Federal case on the issue, *United States v. Kasto*, 584 F.2d 268 (8th Cir. 1978), the Court found evidence of a complainant's specific prior acts of sexual intercourse with other men and evidence as to the fact that she was wearing an intrauterine contraceptive device at the time of the rape irrelevant to either her general credibility or to the issue of consent. 584 F.2d at 272; *See also Pratt v. Parrah*, 615 F.2d 486 (8th Cir.), *cert. denied*, 449 U.S. 852 (1980).

Courts have a duty to protect a witness from questions that go beyond the bounds of proper cross-examination in order to harass, annoy or humiliate a witness. *Alford v. United States*, 282 U.S. 687 (1931); *People v. Hanks*, 17 Ill. App. 3d 633, 307 N.E.2d 638 (1st Dist. 1974). The trial court fulfilled its duty when it properly applied the Illinois Rape Shield statute to exclude irrelevant questions which the defendant had no constitutional right to ask. *Davis v. Alaska*, 415 U.S. 308 (1974); *Rozell v. Estelle*, 554 F.2d 229 (5th Cir.), *cert. denied*, 434 U.S. 942 (1977). Therefore, this Court should deny the Petition for Writ of Certiorari.

## CONCLUSION

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For the foregoing reasons, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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February 2, 1983